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In the Supreme Court of the United States

OCTOBER TERM, 1988

DARRYL JAMES, PETITIONER

v.

STATE OF ILLINOIS

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether evidence obtained as a result of an unlawful arrest may be introduced at trial to rebut the testimony of a defense witness.

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INTEREST OF THE UNITED STATES

This case presents the question whether illegally seized evidence may be introduced at trial to rebut the testimony of a defense witness. That issue is important to the conduct of criminal trials, as is the more general question raised by this case concerning the proper scope of the Fourth Amendment exclusionary rule. Because the issue presented here can arise in federal as well as state prosecutions, the United States has a law enforcement interest in the outcome of this case.

STATEMENT

1. At approximately 11 p.m. on August 30, 1982, three men approached a group of eight youths who were returning home from a party in Chicago. The men de-

manded money. When no money was surrendered, one of the three men produced a gun and began shooting into the larger group. One member of the group was killed and another injured as a result of the gunfire. The next evening, the police arrested petitioner in connection with the shootings. They found him at his mother's beauty shop sitting under a hair dryer. J.A. 17-18, 24-25.

Soon after his arrest, petitioner told the police that, on the evening of August 30, his hair was long, reddish in color, and combed straight back. He said that on August 31 he had gone to his mother's beauty parlor to have his hair dyed and curled in order to change his appearance. J.A. 10-11, 19, 26.

Petitioner was subsequently indicted for murder and attempted murder. Prior to trial, he moved to exclude his post-arrest statement on the ground that it was the fruit of an arrest made without probable cause. The trial court granted the motion. J.A. 19, 26.

At petitioner's trial, five eyewitnesses identified petitioner as the shooter. They further testified that the shooter had shoulder-length "reddish" hair that was worn in a slicked-back "butter" style, and that he wore an earring in his left ear. Each of the witnesses recalled having seen petitioner a few weeks before the shooting wearing his hair in a red "butter" style and wearing an earring in his left ear. At trial, petitioner's hair was black and he was wearing it in a "natural" style. J.A. 18, 26.

Petitioner did not testify in his own behalf, but he called two defense witnesses. Jewel Henderson, a friend of petitioner's, testified that on the day of the shooting petitioner's hair was black. J.A. 2-6. The State then sought to introduce petitioner's previously suppressed statement, in which he had admitted that his hair was red and straight on the day of the shooting, and that he had changed his hair style the next day to alter his appearance. After determining that the statement was voluntary, the trial court permitted the arresting officer to relate it to the jury. J.A. 9-11, 19, 26.

Following that testimony, the trial court instructed the jury (J.A. 12) that the testimony was

> offered for the purpose of impeaching the testimony of Miss Henderson who stated to you that the defendant's hair was black. This evidence is offered to refute and rebut that testimony, that it was not black but it was red at the point the officer said the defendant told him it was red.

At the close of the evidence, the trial court refused to instruct the jury that petitioner's statement should be considered solely to determine Henderson's credibility and not as substantive evidence of petitioner's guilt. J.A. 13, 19, 27. During closing argument, the prosecutor reminded the jury of petitioner's "admission that he changed * * * the color of his hair." J.A. 14, 19, 27.

Petitioner was convicted on both charges. He was sentenced to concurrent terms of 30 years' imprisonment for the murder and 15 years' imprisonment for the attempted murder.

2. On appeal, the Illinois Appellate Court held that the use of the tainted statements to rebut Henderson's testimony violated petitioner's Fourth Amendment rights, and that the error was not harmless. The court therefore reversed petitioner's convictions and ordered a new trial. J.A. 17-23. The Illinois Supreme Court thereafter granted the State's petition for review and affirmed the convictions. J.A. 24-53.

The Illinois Supreme Court relied on the so-called "impeachment exception" to the exclusionary rule, as developed in *Walder* v. *United States*, 347 U.S. 62 (1954); *Harris* v. *New York*, 401 U.S. 222 (1971); *Oregon* v. *Hass*, 420

U.S. 714 (1975); and *United States* v. *Havens*, 446 U.S. 620 (1980). The court observed that those cases "exhibit strong disapproval" of attempts to "transform [the exclusionary rule] into a shield for knowing perjury or intentional misrepresentation." J.A. 35. The court then held that "when a defense witness testifies on direct examination in a manner squarely at odds with evidence which has been suppressed, that evidence may be introduced to challenge the veracity of the testimony." J.A. 37-38.

The court rejected petitioner's contention that the exception to the exclusionary rule recognized in *Walder* and its progeny applies only when the defendant elects to testify. J.A. 35-36. Rather, the court found that the *Walder* line of cases turns on "a balancing between the goals of the exclusionary rule and the importance of arriving at the truth in criminal trials." J.A. 35. In balancing those factors, the court concluded that just as the exclusionary rule does not permit the defendant to perjure himself with impunity, it also should not be applied to bar the government from challenging the veracity of "perjurious testimony" offered through a defense witness. J.A. 36. The court observed that its holding would not erode the protections of the exclusionary rule. Instead, the court explained that "[i]f this exception to the exclusionary rule is limited to the use of the suppressed evidence to rebut statements made by a defense witness on direct examination, there is little likelihood that the police would plan to disregard constitutional rights to obtain a statement from the defendant on the slight chance that a witness for the defense would commit perjury on direct examination." *Ibid.*

Three justices dissented. In their view, the "impeachment exception" to the exclusionary rule is limited to cases involving testimony by the defendant himself. This case is not governed by the impeachment exception, the dissenting justices concluded, because petitioner's illegally obtained statement was used not to impeach the defendant himself, but to rebut the testimony of a defense witness. J.A. 41-53.

SUMMARY OF ARGUMENT

A. The Fourth Amendment exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). In deciding whether the exclusionary sanction is appropriate in a particular context, the Court has applied a pragmatic balancing test: the Court weighs the marginal deterrent effect of excluding evidence in that context against the detrimental effect of the exclusion of evidence on the effectiveness of the criminal process in accurately determining guilt or innocence.

The core function of the adversary process is to uncover the truth. In our system of justice, that function is carried out by providing each party with the tools to challenge the veracity and persuasiveness of the evidence offered by the other. The case against application of the exclusionary rule is at its strongest when the rule interferes with the proper functioning of the adversary system by depriving one party of the means to undermine false testimony (or to correct a false picture of the facts) adduced by the opposing party.

This analysis has been the basis for a series of decisions in which this Court has permitted the use of illegally obtained evidence to impeach a defendant's testimony at trial. The Court has recognized that testing a witness's credibility through the device of impeachment is critical to the jury's ability to arrive at the truth, and that depriving the fact-finder of that evidence would work a grave cost to the truth-seeking function.

B. The same analysis applies in this case. The prosecutor's opportunity to rebut assertions by a defense witness is just as important to the integrity of the trial process as the prosecutor's ability to impeach a defendant who takes the stand in his own defense. The danger that the jury will be misled if false testimony goes unchallenged is too great to justify exclusion of competent evidence that serves to rebut testimony offered on behalf of the defense.

To distinguish between the use of tainted evidence for impeachment, on the one hand, and for rebuttal, on the other, would invite defendants to structure their defenses to avoid having to confront damaging evidence. If petitioner's proposed rule is adopted, defendants could avoid powerful contradicting evidence by the simple expedient of having a defense witness set forth the defense case, rather than having the defendant do so. The truth-seeking function of the adversary process should not have to suffer such readily avoidable abuse. Nor should a rational system of justice provide temptations to engage in such abuse.

C. The exclusionary rule, a product entirely of judicial craftsmanship and not of constitutional imperative, finds its sole justification in the presumed deterrent effect upon police misconduct. But the deterrent effect that might be expected from applying the exclusionary rule in this setting is no greater than the deterrent effect of the rule in the impeachment context. Whether the issue is the impeachment of testimony by the defendant or the rebuttal of testimony by defense witnesses, the incremental deterrent effect of the exclusion of evidence is likely to be minimal. Under this Court's teachings, any deterrence of police misconduct resulting from the exclusionary rule is likely to flow from excluding the illegally seized evidence from the government's case in chief. While an officer engaged in a search may reasonably be presumed to contemplate that

the fruits of his search will result in a prosecution and trial, the prospect and potential content of impeachment and rebuttal are much more speculative. It is therefore implausible to assume that police officers who are undeterred from unlawful conduct by the prospect of the suppression of evidence from the government's case in chief would be persuaded to refrain from that conduct by the prospect that the government will not be able to use the fruits of their unlawful conduct on rebuttal. Even if suppressing illegally seized evidence from use on rebuttal is thought to have some slight deterrent effect, the powerful societal interest in accurate factfinding heavily outweighs that effect and calls for the admission of the evidence.

ARGUMENT

EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT MAY BE USED TO REBUT THE TESTIMONY OF A DEFENSE WITNESS

A. The Exclusionary Rule Should Not Be Applied Where The Cost Of Applying The Rule Outweighs Its Effect In Deterring Unlawful Police Conduct

1. The Fourth Amendment forbids unreasonable searches and seizures, not the use of the fruits of illegal searches in criminal proceedings. As this Court has often observed, the harm suffered as a result of a violation of the Amendment is "fully accomplished" by the unlawful search or seizure itself. The exclusion of illegally seized evidence provides no cure for the constitutional harm. *United States* v. *Calandra*, 414 U.S. 338, 354 (1974); see *United States* v. *Leon*, 468 U.S. 897, 906 (1984); *Stone* v. *Powell*, 428 U.S. 465, 486 (1976). In erecting the exclusionary rule as a "means of effectuating the rights secured by the Fourth Amendment," *Stone* v. *Powell*, 428 U.S. at

482, the Court has recognized that the exclusion of illegally seized evidence is necessarily designed

> to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.

Elkins v. *United States*, 364 U.S. 206, 217 (1960); see *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965); *United States* v. *Peltier*, 422 U.S. 531, 536-539 (1975).

As with any remedial device, "application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively served." *Illinois* v. *Krull*, 480 U.S. 340, 347 (1987). Because the purpose of the exclusionary rule is to deter unlawful police conduct, not to compensate victims of such misconduct, and because the exclusion of competent evidence exacts a high cost in the truth-seeking process, this Court has emphasized time and again that the exclusion of tainted evidence in a particular class of cases must be justified by the added deterrent effect of extending the rule to that class of cases. See *United States* v. *Leon*, 468 U.S. at 906-913. For that reason, the exclusionary rule "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *Stone* v. *Powell*, 428 U.S. at 486.

The Court has declined to apply the exclusionary rule in a variety of contexts. In each such instance, the Court has concluded that the cost to society that results from withholding trustworthy evidence outweighs the deterrent effect of excluding the evidence. For example, in *United States* v. *Calandra*, *supra*, the Court refused to bar the government from questioning a grand jury witness on the basis of information obtained in an illegal search. The Court observed that such an "extension of the exclusionary rule would seriously impede the grand jury," while the "incremental deterrent effect" of excluding evidence in

the grand jury context would be "uncertain at best." 414 U.S. at 349, 351.

The Court employed a similar analysis in *Stone* v. *Powell*, *supra*, where it declined to grant federal habeas corpus relief based on the introduction of tainted evidence at a state court trial. The Court observed that the risk that a conviction "might be overturned in collateral proceedings" as a result of the introduction of illegally obtained evidence would not add to the "disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review." 428 U.S. at 493. The Court considered the societal costs of applying the exclusionary rule in that context too substantial to justify the "minimal" contribution to the effectuation of the Fourth Amendment. 428 U.S. at 494-495.

Finally, in *United States* v. *Leon*, *supra*, the Court refused to apply the exclusionary rule to evidence seized by police officers who acted in good faith in obtaining a warrant, where the warrant was later held not to be supported by probable cause. Once again applying its balancing approach, the Court decided that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." 468 U.S. at 922.[1]

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[1] In *United States* v. *Ceccolini*, 435 U.S. 268, 277, 280 (1978), the Court upheld the admission of the testimony of a witness who, as the result of an illegal search, was identified as possessing relevant information. The Court recognized that in that context the effect of exclusion on the future conduct of the police would be "slight," and would come at the high cost of disqualifying a knowledgeable and willing witness. Likewise, in *United States* v. *Janis*, 428 U.S. 433, 453-454 (1976), the Court declined to preclude the use of tainted evidence in a civil tax proceeding, where that evidence had already been excluded from a state criminal prosecution, because the additional deterrent

2. Weighing the costs of the exclusionary rule against its benefits, the Court has on several occasions held that illegally obtained evidence may be used at trial to impeach a defendant's false testimony. In *Walder* v. *United States*, 347 U.S. 62 (1954), the Court upheld the government's use of suppressed evidence—in that case, a heroin capsule illegally seized two years prior to trial—to impeach the defendant's statement, at his trial for an unrelated drug violation, that he had never possessed narcotics.

Subsequently, in *Harris* v. *New York*, 401 U.S. 222 (1971), the Court permitted the State to impeach a defendant's testimony by confronting him on cross-examination with inconsistent statements he had made while in custody. Although the inconsistent statements were taken in violation of the rule in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court held that the balance of interests justified the use of the statements for impeachment purposes. The Court explained (401 U.S. at 225):

> The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby.

The Court added that "assuming that the exclusionary rule has a deterrent effect on proscribed police conduct," ade-

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effect of exclusion would "not outweigh the cost to society of extending the rule to that situation." The judgment that exclusion would not have an appreciable deterrent effect also underlay the Court's decision to permit the introduction of evidence obtained through searches conducted in reliance on a statute that was subsequently held to be unconstitutional. *Illinois* v. *Krull*, *supra*. See also *United States* v. *Peltier*, 422 U.S. 531, 538-539 (1975) (deterrence rationale of exclusionary rule not furthered by retroactive application of new constitutional doctrines).

quate deterrence of violations of the prophylactic rule adopted in *Miranda* is effected by barring the affirmative use of improperly obtained evidence in the prosecution's case in chief. *Ibid.*

The Court applied a similar balancing test in *Oregon* v. *Hass*, 420 U.S. 714 (1975). There, the defendant was arrested on suspicion of bicycle theft. He made certain admissions regarding the thefts before he was allowed to contact his attorney. Those admissions were suppressed under *Miranda*. After the defendant made contradictory assertions at trial, however, the trial court permitted the State to offer the suppressed statements for impeachment purposes.

In upholding the use of the evidence, the Court reiterated the statement in *Harris* that it " 'does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.' " 420 U.S. at 721 (quoting 401 U.S. at 224). In the Court's view, the policies underlying the exclusionary rule did not compel the Court to let the defendant's perjury go unchallenged, because "there is sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief." 420 U.S. at 722.

Similarly, in *United States* v. *Havens*, 446 U.S. 620 (1980), the Court permitted the introduction of illegally seized physical evidence to impeach the defendant's denial on cross-examination that he had possessed any incriminating material in connection with a cocaine smuggling scheme. The Court observed (446 U.S. at 627) that "the policies of the exclusionary rule no more bar impeachment here than they did in *Walder*, *Harris*, and *Hass*." In those cases, the Court observed, "[t]he incremental furthering of [the policy of deterrence] by forbidding impeachment of

the defendant who testified was deemed insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the fact-finding goals of the criminal trial." *Ibid.*

B. Applying The Exclusionary Rule To Bar The Rebuttal Of Defense Witness Testimony Would Impose An Unacceptably High Cost On The Truth-Seeking Process

In the cases recognizing an "impeachment exception" to the exclusionary rule, the Court has stated that to exclude evidence in this context would exact an especially high price by distorting the truth-seeking process at trial. Preventing the use of evidence for impeachment, the Court has noted, poses a far greater risk of converting a constitutional protection into a "license to use perjury by way of a defense," *Havens*, 446 U.S. at 626, than preventing the use of the same evidence in the prosecution's case in chief. The same analysis, we believe, applies to the application of the exclusionary rule to evidence the government seeks to use to rebut the testimony of defense witnesses.

1. The public has a compelling interest in "prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U.S. 165, 175 (1969). To preserve the integrity of the judicial process and achieve the "fundamental goal of our legal system," *Havens*, 446 U.S. at 626, it is critical that witnesses tell the truth. See *Harris*, 401 U.S. at 225; *Hass*, 420 U.S. at 723. So strong is the policy against false testimony that this Court has permitted prosecution for perjury even where the government "exceeded its constitutional powers in making the inquiry." *United States* v. *Mandujano*, 425 U.S. 564, 577 (1976) (plurality opinion); *id.* at 576 ("Perjured testimony is an obvious and flagrant affront to the

basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative.").

The adversarial truth-seeking process is most vulnerable when one party is forbidden to present evidence that could undermine false or misleading testimony introduced by the other party. See *Olden* v. *Kentucky*, 109 S. Ct. 480 (1988); *Davis* v. *Alaska*, 415 U.S. 308 (1974). When such evidence is excluded, the "enormous societal cost of excluding truth," *Nix* v. *Williams*, 467 U.S. 431, 445 (1984), is augmented by the danger that the jury will be permitted to believe what is false. In recognition of that danger, the Court in a variety of settings has accorded prosecutors greater leeway in impeachment and rebuttal than in their case in chief.[2] The Court's rulings in each instance reflect the recognition that the jury's ability to reach the correct result in a case is imperiled more by permitting false testimony to go uncorrected than by withholding reliable evidence in the first instance.

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[2] See, *e.g.*, *Raffel* v. *United States*, 271 U.S. 494 (1926) (although a prosecutor ordinarily may not comment upon a defendant's failure to testify, the prosecutor in a second trial in which the defendant takes the stand may cross-examine the defendant as to his failure to testify in the first trial); *Doyle* v. *Ohio*, 426 U.S. 610, 619-620 n.11 (1976) (government may impeach a defendant with his failure to tell his exculpatory story after receiving *Miranda* warnings if the defendant testifies that he did tell that story to the police following arrest); *Jenkins* v. *Anderson*, 447 U.S. 231 (1980) (government may impeach a testifying defendant with his failure to tell his exculpatory story prior to his arrest); *Tennessee* v. *Street*, 471 U.S. 409 (1985) (government may offer into evidence a co-defendant's confession to correct the defendant's misleading testimony that his own confession was a coerced imitation of his co-defendant's); *United States* v. *Robinson*, 108 S. Ct. 864 (1988) (prosecutor's comment on defendant's failure to testify, offered to rebut defense counsel's suggestion that the government had prevented him from testifying, did not violate the Fifth Amendment).

2. a. The Court's concern that unrepudiated testimony will distort the fact-finding process informed its decisions in *Walder, Havens, Harris,* and *Hass.* That potential is equally present when it is a defense witness who testifies, rather than the defendant himself, and when the evidence that is offered to correct a misleading impression serves to rebut the witness's misrepresentations rather than simply to impeach his credibility.

The introduction of evidence to rebut a witness's testimony is a long-recognized method for guarding against perjury and probing the reliability of the witness's statements. See E. Cleary, *McCormick on Evidence* §§ 33, 47, at 66, 97-99 (2d ed. 1972); 3A J. Wigmore, *Evidence* § 1000 (Chadbourne rev. 1970). The use of such evidence to contradict a defense witness serves the dual purpose of "relevant proof and of reflecting on the credibility of contrary witnesses." E. Cleary, *supra,* at 99.[3]

[3] A witness's own inconsistent statements and statements by others that contradict the witness's assertions both serve to undermine a witness's credibility by casting doubt on the truth of the witness's testimony and suggesting that the witness has "made some sort of mistake." 3A J. Wigmore, *supra,* § 1017, at 994. Although it is possible to discredit, or "impeach," a witness with his own self-contradictory statements without considering the impeaching statement for its substance, it is not possible to "impeach" by extraneous contradictory evidence without permitting that evidence to be accepted for the truth of what it declares. When a witness's own prior inconsistent statements are introduced to discredit him, "[t]he capacity to err invariably appears, from the very fact of self-contradiction." *Id.* at 995. The jury can conclude that the witness is untrustworthy without considering which, if any, of the inconsistent statements is true. By contrast, when a witness is contradicted by the statement of another, "[the capacity to err] does not appear unless we believe the opposing witnesses' assertions." *Ibid.* The contradiction generated by the disparity in the evidence makes the discredited witness appear less believable, but only by convincing the jury that what the witness has stated is untrue. Extraneous contradictory evidence offered for rebuttal therefore *must* function as a direct refutation of the witness's testimony, because its effectiveness as rebuttal requires that the jury evaluate and consider the testimony as proof of the matter asserted.

Like the exclusion of evidence that impeaches a defendant, the exclusion of evidence that refutes a misleading line of testimony by a defense witness is far more damaging to the truth-seeking process than the preclusion of the government's affirmative use of such material in its case in chief. Barring the government from using suppressed material in its case in chief deprives the jury of certain evidence that might serve to strengthen the government's case. Even if some probative evidence is withheld, however, the prosecutor may succeed in proving the same facts by other means. Through the testimony of additional witnesses or the presentation of other available evidence, the jury may thus be given an accurate, if incomplete, picture of the case. But when a defense witness presents testimony that creates a false impression of the facts, and the jury's misapprehension cannot be corrected because a pretrial suppression order shields the witness from contradiction, the truth-seeking process may be seriously distorted. An incomplete picture is ordinarily far less misleading than one that contains affirmative inaccuracies.

It is clear in this case, as the trial judge advised the jury (J.A. 12), that the defendant's suppressed statements were introduced to rebut Henderson's testimony and therefore had to be considered by the jury for their truth. While evidence of that sort is sometimes referred to as a form of impeachment, we believe it is more accurate to refer to it as rebuttal, since the evidence has its effect of undermining the defense testimony only to the extent that the jury believes it to be true. For that reason, we believe the Illinois Supreme Court erred in suggesting that the trial court should have instructed the jury that the suppressed statement could be used only for impeachment and not "as evidence of the commission of any of the crimes charged." J.A. 39. Such an instruction would be confusing, it would not be required by any rule of evidence, and for the reasons we discuss in the text, it would not be required by exclusionary rule policy.

In this case, were it not for the admission of petitioner's statements to the police the day after the shootings, the jury might have reached an erroneous conclusion about the murderer's identity. By calling Jewel Henderson to testify that petitioner's hair was black on the day of the shootings, petitioner sought to convince the jury that the eyewitness identifications were mistaken. If petitioner's post-arrest statement had not been admitted, the jury would have been deprived of the most compelling reason to doubt the accuracy of Henderson's testimony and therefore might have found her testimony sufficient to raise a reasonable doubt as to whether petitioner was the culprit.

b. This case demonstrates that there is no important difference between permitting tainted evidence to be used to impeach a testifying defendant and permitting such evidence to be used to contradict a defense witness's testimony. Petitioner could have testified at trial and claimed that his hair was black on the day of the shooting. Instead, he chose to present the same claim to the jury by calling Henderson to give that testimony. Of course, if petitioner had testified about his hair color, the State could have impeached him with his prior admissions. There is no reason to adopt a different rule when petitioner has simply used a different witness to offer the same story.

Allowing a defendant to put on a witness to testify inconsistently with the defendant's voluntary statements to the police grants a license to engage in perjury by proxy. If a witness testifying on the defendant's behalf is shielded from effective challenge by the exclusion of the defendant's prior inconsistent statements, the defendant can do indirectly what he cannot do directly; he can mislead the jury by mounting a false defense free from contradiction by competent evidence that he knows to be in the possession of the authorities. The potential for mischief in allowing a defense witness to go unchallenged is even greater

than in allowing the defendant himself to testify without fear of contradiction; the reason is that the natural skepticism that accompanies testimony from a defendant is not present, or not as strong, in the case of testimony from other witnesses. Thus, permitting a witness other than the defendant to present the defendant's story without fear of contradiction by the defendant's own inconsistent admissions could lead to grave distortions of the truth-seeking process in any case in which a friendly witness is willing to testify in a manner inconsistent with the defendant's own admissions or other reliable evidence that has been suppressed on Fourth Amendment grounds.

Even if the difference between impeachment and rebuttal might be significant in other settings, it is of particularly little moment here. If the defendant chooses to offer his theory of defense through his own testimony, and he is impeached by his own inconsistent statements to the police, the effect of the impeachment is to discredit his theory of defense in the eyes of the jurors. If the defendant chooses to offer his theory of defense through a defense witness, and the defense witness's testimony is rebutted by the defendant's inconsistent statements to the police, the effect is the same. Because rebuttal serves a role in the adversary process that is parallel to and at least as important as impeachment, the two should stand or fall together.

This Court's decisions do not justify drawing a distinction, for exclusionary rule purposes, between evidence offered for impeachment and evidence offered in rebuttal. Contrary to petitioner's assertion, there is nothing in the "impeachment exception" cases that would bar the government from using tainted evidence for rebuttal. While the Court in each of the "impeachment exception" cases noted that the jury was instructed that it could use the evidence in question only for impeachment purposes, the Court did not rely on that restriction as a basis for admitting the

evidence. Rather, the Court found the policies of the exclusionary rule sufficiently served as long as the government was barred from using the suppressed evidence in its case in chief. *Harris*, 401 U.S. at 225; *Hass*, 420 U.S. at 722; see also *Havens*, 446 U.S. at 627. Permitting tainted evidence to be used for rebuttal purposes is therefore not at odds with the decisions of this Court.

C. Violations Of The Fourth Amendment Would Not Be Significantly Deterred By Excluding Improperly Obtained Evidence From The Government's Rebuttal Case

The remaining question is whether applying the exclusionary rule to prevent the government from correcting a misleading impression created by a defense witness will provide sufficient additional deterrence of police misconduct to outweigh the harm of allowing the testimony to go unchallenged. We think not. Permitting the introduction of suppressed evidence to undermine a defense witness's testimony is unlikely to encourage the police to detain and question defendants without probable cause or otherwise to seize evidence illegally. The exclusionary rule already requires suppression for the most important prosecutorial needs. Suppression in the circumstances presented here would not provide sufficient additional deterrence to outweigh the substantial societal costs of exclusion.

As this Court has recognized, the expectation that any evidence obtained in violation of the Fourth Amendment will be excluded from the prosecution's case in chief provides the principal disincentive to unlawful police action. In many cases, a suppression order destroys the prosecution's case at the outset, because the prosecutor is left with insufficient evidence to withstand a motion for a judgment of acquittal at the close of the government's case. But even if the case does go to trial, the exclusion of

the evidence for rebuttal purposes would result in very little additional disincentive to improper action by the authorities, because the opportunity to use illegally obtained evidence for this purpose arises only in limited circumstances.

By definition, illegally seized evidence can be used in rebuttal only if there are defense witnesses to rebut. Defendants, however, frequently choose to put the government to its proof and not to mount a defense. In addition, because illegally seized evidence is already admissible to impeach the defendant, the "rebuttal exception" to the exclusionary rule will affect only those cases in which the defendant puts on a defense but does not testify on his own behalf. Finally, even if the defendant does put on a defense, the rebuttal exception will come into play only if the defense witnesses offer testimony that is at odds with suppressed evidence the defendant knows to be in the government's possession. The defendant can avoid the admission of the tainted evidence if his witnesses avoid testifying in a manner that is inconsistent with the suppressed evidence in question.[4]

The rebuttal exception will therefore be inapplicable in many cases, and the defendant will in any event maintain control over the admission of the tainted evidence, either by not testifying, by not putting on a case, or by shaping the defense case in a way that is not inconsistent with the

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[4] That appears to have been true in part in this case. In addition to the admissions about his hair color, petitioner made admissions to the police about the shootings. The State sought to introduce those admissions at trial on the ground that Henderson's testimony in effect presented an alibi defense that was inconsistent with petitioner's statements regarding the crime. The trial court, however, concluded that Henderson's testimony was not contrary to petitioner's admissions about the shootings and therefore did not permit the State to introduce those admissions in rebuttal. Pet. Br. 2, 4.

tainted evidence. Those factors significantly diminish the marginal deterrent effect of applying the exclusionary rule to rebuttal evidence.

The only possible justification for a rule that would permit the use of tainted evidence for impeachment but not for rebuttal would be that such a rule would bar the use of suppressed evidence in a particular class of cases, and to that extent arguably would enhance the deterrent effect of the exclusionary rule. But the same increased deterrent effect could be achieved, with the same support in logic, by refusing to permit the use of suppressed evidence under any circumstances in all odd-numbered cases. Simply reducing the number of instances in which illegally seized evidence will be used at trial is not a rational way to develop exclusionary rule policy.[5] What matters in each set-

[5] The Illinois Supreme Court apparently sought to ensure that tainted evidence would not often be used for rebuttal by setting forth several conditions limiting the circumstances under which a defense witness's testimony could trigger the introduction of suppressed evidence. First, the court held that a defendant's suppressed statements could be admitted only to rebut defense witness statements made on direct examination, and only if there was a "direct, material relationship between the trial testimony and the impeaching evidence." J.A. 38. In addition, the court stated that "it must be apparent that the untrue statement of the witness, as so measured, has been purposely presented by the defendant." J.A. 37. Finally, the court barred the use on rebuttal of "any part of a suppressed statement of the defendant which can be characterized as a confession." *Ibid.*

In our view, the conditions the court placed on the introduction of suppressed evidence to rebut a defense witness are neither constitutionally required nor otherwise justified under the balancing test adopted by this Court in applying the exclusionary rule. First, there is no reason to limit the exception to the rebuttal of evidence offered on direct examination. The potential of false testimony to pervert the truth-seeking process does not depend on whether the false answers are given on direct or cross-examination. As long as the cross-examination is properly within the scope of the witness's direct exami-

ting is the importance of the evidence to the truth-finding process, as weighed against the effect that exclusion might have on the willingness of police officers to honor Fourth

nation, any exception to the exclusionary rule that applies to direct examination should also apply to cross-examination, as this Court held in *Havens*, 446 U.S. at 626-627.

Likewise, there is no basis for requiring that the suppressed testimony squarely refute the testimony of a defense witness or that it be apparent that the defense testimony at issue was purposely elicited by the defendant. Evidence that presents a "mere inconsistency" may sometimes prove critical in correcting a false impression created by a witness's testimony on a matter central to the case. And, apart from the difficulty of determining whether particular testimony elicited from a defense witness was "purposely presented" by the defendant, false testimony can be misleading even if it was volunteered by the witness rather than having been planned and promoted as part of the defense strategy.

Finally, there is no reason to prohibit the use of a suppressed confession as distinguished from an admission that does not amount to a confession. In setting forth this limitation, the court relied on a statement in *Walder* that the defendant "must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it." 347 U.S. at 65. See J.A. 37. In construing this statement, the Illinois Supreme Court got it backwards: the statement in *Walder* addressed the introduction of tainted evidence to impeach the defendant's in-court denial of the elements of the offense; it was not directed at the content of the defendant's out-of-court statement. The *Walder* statement thus has no application here, since petitioner did not testify; the introduction of the illegally seized evidence was therefore not triggered by any exculpatory testimony by petitioner. In any case, this Court's decision in *Harris* makes clear that there is no categorical proscription against the introduction of a suppressed confession. With respect to the impeachment of a defendant by his out-of-court statements, the Court in that case declined to carve out an exception for statements that amount to an admission of guilt. Finally, distinguishing between a damaging admission and a confession would be a fruitless endeavor; there is no sharp dividing line between the two and no policy reason to try to draw one.

Amendment safeguards. Because in the rebuttal context, as in the impeachment context, the need for the evidence is great and the marginal deterrent effect of exclusion is minimal, illegally seized evidence should be admissible when it is offered for purposes of rebuttal.

CONCLUSION

The judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted.

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